United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1182

To be argued by:

LAWRENCE STERN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

MONTY JOYNER,

Defendant/Appellant.

----------x

Docket No. 75-1182

AN APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT/APPELLANT

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UNITED STATES OF AMERICA,

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QUESTION PRESENTED

Whether the sentencing court's reliance on materially untrue assumptions about appellant's character, present motivations, and prior criminal record, derived from the "rap" sheet listing of a prior charge that had been dismissed, and the court's failure to consider facts in mitigation of penalty, and the probation department's erroneous, baseless and misleading report, deprived appellant of a sentencing in accordance with due process of law.

STATEMENT PURSUANT TO RULE 28 (a)(3)

A. Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York [Bramwell, J.] rendered on April 7, 1975, convicting appellant, after a guilty plea to an information, of knowingly possessing a United States Treasurer's check in the amount of $284.80, which check had been stolen from the mails [18 U.S.C. §1708], and sentencing him to three years imprisonment to run concurrent to a one year State prison sentence growing out of the same transaction.

Timely notice of appeal was filed, and this Court assigned Lawrence Stern, Esq. as counsel on appeal.

B. Statement of Facts

On February 19, 1975, appellant, Monty Joyner, appeared before Judge Henry Bramwell in the Eastern District and waived his rights to indictment and trial by jury and pled guilty to a one count United States Attorney information charging appellant's possession on August 12, 1974, of one stolen United States Treasurer's check in the amount of $284.80 [18 U.S.C. §1708].

Mr. Joyner was arrested on September 28, 1974, by the New York City police as one of some 80 persons invited by two undercover city policemen to a sham party in a warehouse in Queens. This mass arrest was well-publicized at the time; the two policemen in Queens had been conducting a fencing operation out of an oil company

storefront during the summer of 1974. They had apparently used agents and informants on the street to solicit the purchase of stolen property of all kinds. In September, all those from whom they had made purchases of varying kinds and quantity were invited to the party and were there arrested. Mr. Joyner, as one of the approximately 80 people arrested, was accused on separate State and Federal charges of possession of stolen goods growing out of sales to the undercover New York City policemen. He was charged individually, for substantive offenses only. The Federal complaint charged the offense to which he ultimately pleaded before Judge Bramwell.

On December 10, 1974, Mr. Joyner pleaded guilty in the Supreme Court of the State of New York, Queens County, to the State charges growing out of the sales to the undercover policemen, a one count indictment charging him with criminal possession of stolen property in the second degree (an American Express Credit Card possessed on September 9, 1974), a Class E felony. On January 14, 1975, he was sentenced by the Honorable Thomas Agresta on this guilty plea to one year imprisonment. He is presently serving that sentence on Riker's Island; he has been in State custody on these charges since October 31, 1974. After arraignment on the federal charges on September 30, 1974, he was released on a $5,000 magistrate's bond.

As the above procedural history of the case indicates, Mr. Joyner readily admitted his guilt, waiving both indictment and trial in the federal case. He sought only to complete the process and penalty as quickly as possible so that he might return to the otherwise decent road he was attempting to follow in his life. Mr. Joyner had been an addict since 1959, from the age of 19. For the first time in his life, however, in the two years preceding his

arrest on these charges, he had become heroin free and was doing very well in the Harlem Unit of the Methadone Maintenance Treatment Program at 103 East 125th Street, New York, N.Y. 10035 (See letter from Mr. John Purcell, supervisor of that program, addressed to Paul Lazarus, the former Assistant U.S. Attorney who handled this case, at Appellant's Appendix). He had found employment and was working steadily at a part time job as a messenger with the National Quotation Company, and as a full-time apprentice carpenter at Custom Master, 400 Manhattan Avenue (Hank Spooner, prop.). With the money he was earning in the carpentry shop (he was only earning about $25 per week as a messenger), he began to settle down and assume certain financial responsibilities. He bought a car and moved into a new apartment.

Suddenly, in the month of August, 1974, work fell off in the carpentry shop and Mr. Spooner could not pay Mr. Joyner a salary. Mr. Joyner's newly assumed debts had to be paid, however. At about the same time, a man whom Mr. Joyner had known through a fellow messenger at National Quotation, offered Mr. Joyner ten dollars to chauffeur him back and forth between Manhattan and the oil company storefront in Queens. Mr. Joyner drove this man, known only as Teddy, to the oil company a few times. On one occasion, Teddy took him inside and there the undercover policemen offered appellant ready money for stolen goods and encouraged him to get as much as he could. There has never been any charge or evidence, nor is it the fact, that Mr. Joyner, who was desperate for the money at that time, ever engaged in

any thefts of checks. However, having been an addict on the streets for many years, he did know where these could be purchased on the street. And, that was his crime. This history, of course, as Mr. Joyner himself would be the first to admit, does not excuse his act, but it is offered here as it was to the sentencing court as explanation in the hope of mitigation of the penalty to be imposed by the sentencing judge.

Although there was no actual entrapment, as the law defines it, in this case the facts are that a weak man, ravaged by years of addiction, who was, on his own steam, working his way back, who had voluntarily admitted himself into a drug treatment program and who had found employment and who wanted desperately to hold onto his own car and his own apartment, for which he had worked honestly for two years, was enticed into this crime by police solicitation. For the preceding two years, Mr. Joyner had not been involved in any criminal activity. These two clean years of progress followed his release from Clinton Prison in January, 1972, after serving 6 months on a burglars tools misdemeanor. His three other convictions were all drug related misdemeanor burglaries, or criminal trespasses. This is a man who, despite the well-recognized degenerate effect of heroin, has never committed a violent crime in service of his habit, and who, finally, at the age of 32, after 13 years of addiction during which he was unaided by family help, education or counseling, was taking responsibility for himself and working towards a better life.

And, prior to this federal sentence which has permanently

jeopardized the Riker's Programs, appellant was continuing that attitude during his incarceration at Riker's Island. Having achieved his high school equivalency diploma during his previous stay at Clinton, he enrolled himself for college credit at the Riker's branch of the John Jay College. He was taking three courses, Sociology, English and Urban Studies. Having had the previous carpentry experience at Custom Master, Mr. Joyner took the eligibility examination for further training in the Riker's Manpower Development and Training Program and he was admitted to their carpentry training program. In Appellant's Appendix is a copy of a letter received from Mrs. Francis Rodriques, Department of Correction Rehabilitation Counselor, who attests to Mr. Joyner's excellent prospects for rehabilitation. All of this training and progress is jeopardized by the Federal sentence herein attacked.

Monty Joyner is now 34 years old. He never knew his father who was killed in an auto accident before his birth. His foster mother single handedly brought him and his brother to New York in 1947 from North Carolina and from then on she worked around the clock. Her struggle is a credit to her; she lives now in Westbury, Long Island. But, there was little time to attend to Monty who was left on the streets where he became an addict and dropped out of high school. Whatever crimes he has committed in the service of his addiction have been petty, property, non-violent and drug related. But that was all behind him. He had kicked the habit, and he had kicked the adolescent immaturity

that knew no father figure or self-responsibility. He has exhibited, both outside of prison in the last couple of years and presently at Rikers, a determination to rehabilitate himself. The authorities at his former drug program and at Rikers, as the letters attest, believe that his prospects are excellent. He has shown the maturity to accept his guilt and to face up to it, and he was already serving a one year prison sentence for the non-violent crime which is essentially the same as that which is the subject of the federal information and which grows out of the same set of transactions. When he had finished that sentence, should the District Judge have seen fit to impose a concurrent and equal federal term, or a period of federal probation to follow the State sentence, Mr. Joyner would have had immediate access to the Drug Treatment Program. His counselor, Mr. Arthur Hawkins, had told counsel that as far as they are concerned, Mr. Joyner is still actively enrolled. He would have had access to his old job at Custom House. Monty Joyner is not a threat to society and his further incarceration beyond his State sentence should not have been necessary for that reason, and, given the nature of this crime, counsel respectfully suggested to the District Court that a year's incarceration with the attendant disabilities of felony convictions is punishment enough. Indeed, society would best be served by nabling Mr. Joyner to continue along his own path toward the rehabilitation which he had begun outside of prison before unfortunate circumstances, not entirely of his own making, led to this incident.

On April 7, 1975, appellant appeared before the District Court for sentencing. All of the above factual information about appellant and the circumstances of the crime had been presented to the District Judge in a sentence letter submitted in March (See Appellant's Appendix). The substance of the history was stated once again during the sentence proceedings. Counsel emphasized that for the two years prior to appellant's arrest on this crime, this thirteen year veteran of addiction had shown a change of direction toward self-rehabilitation by voluntarily enrolling himself in a drug program and becoming heroin-free, by holding down two jobs, by learning carpentry, and by getting himself an apartment and a car, and by his non-involvement in criminal activity. Counsel also emphasized the fact that appellant had never committed a violent crime in the service of his habit, and that his four prior misdemeanor convictions had been burglars tools or trespass or narcotics convictions. The point being stressed was that since, "it is only since 1972, it is only since then that he has finally become heroin free and unaddicted," that he should be given another chance to prove the good intentions exhibited by the last two years of self-motivated rehabilitative activity, free from the kind of police inducement that preyed on the frightened sensibility of a man who, not used to responsibility, was, at that time in danger of losing the bit of security he had built for himself (minutes of 4/7/75 at 12, 3-12).

In response, the Court singled out a 1973 arrest to disprove

counsel's description of appellant's character, history and prospects for rehabilitation, and the following colloquy ensued:

> THE COURT: Counselor, since then and on 8/14/73, the case was dismissed, but it's an assault and possession of loaded firearms. Are you still telling me this man is non-violent since then?
>
> MR. STERN: He was not guilty of the crime, your Honor.
>
> THE COURT: I understand they dismissed. I understand this, but this man has a history. He has a history. Each year, almost, there is some type of situation where he is involved in crime and for you to stand up here and say this man is bringing himself back, it's not so.
>
> It's not so on this type of a situation. I give you every right to talk for your client and say anything you want, but when I see a record like this and you stand up here and give me laudatory phrases as to what this man's position is, it's inconsistent with what he's doing....
>
> MR. STERN: I'm trying to refer your Honor to the record of the facts, not trying to make laudatory remarks. Everything I've said has been connected to a fact in the record, the fact that he was charged with the crime that was ultimately dismissed...
>
> THE COURT: Does not mean he did it. I agree with you 100%. I agree with that 100%, the fact that he was charged never means he did it. All I can look at are his convictions, but when I see a history like this... I don't think it's happening exactly the way you're telling it to me...
>
> MR. STERN: Well, your Honor, if you would look at the facts. Since 1972 it is a fact that the man got a job, a long-term skilled job in which he was learning carpentry in 1972. It is a fact that he was working for the National Quotation Messenger Service, part-time, over and above the carpentry job. It is a fact that he entered the Harlem Unit of Beth Israel Hospital on his own, voluntarily, and became heroin free for the first time in his life, on his own, your Honor.
>
> The letters from Riker's Island and from the supervisor of the Harlem Unit attest to the fact that he was one of their most favored cases and has been. Mrs. Rodriquez says that, Mr. Purcell at the Harlem Unit says that. They don't say that this man, that it's not a fact that this man has been doing something for himself. They say the opposite.

THE COURT: He's not stopping. You can tell me all of the facts, but he's back here.... and this was an involved situation.

MR. STERN: There were ten checks... over a three day period, but the police kept saying to him, 'Come on, you can get us more, bring us more.' It was not something that he was doing on his own. He was pulled into it, your Honor.

(Id. at 12-15)

Counsel also brought to the Court's attention various errors in the probation report, and asked the Court to disregard the subjective and baseless remarks in the report concerning appellant's character and motivation. The Report was reluctant to concede that appellant had in fact achieved his High School Equivalency Diploma at Clinton Prison, so they added the meaningless phrase, "Although the records are not readily available." By this language, the Report attempts to create a negative impression without having done the complete investigative job which might have resulted in their inability to make such a statement.

After reciting appellant s accident of birth out-of-wedlock, the Report attempts to give the negative impression, again without factual basis, that having been born out-of-wedlock, appellant probably has out-of-wedlock children himself. They did this, by putting into the Report the needless statement that appellant, "disclaims any out-of-wedlock children."

The Report again attempts to leave a negative impression by stating a half-truth; it states that appellant has been unemployed since the arrest on these charges. The unstated reason for that unemployment, of course, is that he was incarcerated upon his arrest in October, 1974.

The Report states that appellant failed to profit from his

previous incarcerations, but the Report fails to add that he was an addict throughout the 13 years prior to his last incarceration at Clinton, and that at Clinton and since Clinton, he has done all the rehabilitative things described herein.

The Report was also replete with baseless subjective impressions that were not explained or connected to the facts of appellant's life, and that especially avoided reference to the facts of his self-rehabilitation -- "appears shrewd and manipulative",; expressions of good intentions are "mere verbalizations"; "has not recognized his own shortcomings and continues to display anti-social mode of behavior"; "lacking meaningful goals for the future." (Id. at 10-12 and see the Probation Report).

The Court sentenced appellant to a 3 year prison term and ordered the term to run concurrent to the one year State sentence he was already serving. However, since appellant was on federal bail during his State incarceration from October, 1974 to April 7, 1975, the date of the federal sentence, appellant probably does not receive credit on his federal sentence for this State time served. The net result is that appellant will probably serve the one year State sentence after which he will be subject to an actual federal sentence of 2-1/2 years.

ARGUMENT

POINT I

THE SENTENCING COURT's RELIANCE ON MATERIALLY UNTRUE ASSUMPTIONS ABOUT APPELLANT'S CHARACTER, PRESENT MOTIVATIONS AND PRIOR CRIMINAL RECORD, DERIVED FROM THE "RAP" SHEET LISTING OF A PRIOR CHARGE THAT HAD BEEN DISMISSED, AND THE COURT'S FAILURE TO CONSIDER FACTS IN MITIGATION OF PENALTY, AND THE PROBATION DEPARTMENT"S ERRONEOUS, BASELESS, AND MISLEADING REPORT, DEPRIVED APPELLANT OF A SENTENCING IN ACCORDANCE WITH DUE PROCESS OF LAW.

Defense counsel had argued to the sentencing court that (1) appellant was a non-violent person who, despite 13 years of narcotics addiction, had never committed a violent crime in service of his habit; (2) appellant had in 1972 at the age of 32 become heroin free for the first time in his adult life, and had taken actual, documented, steps toward his own rehabilitation; (3) appellant had committed no crimes during the two years of his newly achieved non-addiction, had held two jobs, was learning carpentry, had obtained his own home and car, but had become involved in the incidents underlying this case only because of a series of circumstances which preyed on his own insecurities when work fell off in the carpentry shop and the police offered immediate and ready money to save his car and apartment. The sentencing Court did not consider these mitigating facts, because it improperly relied on erroneous presumptions which negated them. Appellant's "rap" sheet was the Court's focus of concern in the imposition of sentence and a dismissed charge in August, 1973, was relied upon by it to justify the disregard of the

self-rehabilitative factors in appellant's recent background. While announcing its adherence to the presumption of innocence, the Court presumed appellant's guilt from a rap sheet listing of an arrest for assault and possession of a weapon that had been dismissed. The Court did not make inquiry into the facts and circumstances of the arrest and dismissal, but from the rap sheet alone (no circumstances were given in the Probation Report) the Court concluded,

> Since then [1972] when appellant became non-addicted] and on 8/14/73, the case was dismissed, but it's an assault and possession of loaded firearms. Are you still telling me this man is non-violent since then... I understand they dismissed... but this man has a history... Each year, almost, there is some type of situation where he is involved in crime and for you to stand up here and say this man is bringing himself back... give me laudatory phrases as to what this man's position is, it's inconsistent with what he's doing.
>
> (Id. at 12-13)

If the law forbids the use of unconstitutionally obtained prior convictions in the imposition of sentence, notwithstanding the weight of the underlying evidence to support such convictions, it follows that the law should forbid the same use of a mere charge of crime, which never even reaches trial, let alone conviction, especially when there is no underlying evidence to support the charge. If an unconstitutionally obtained conviction must be regarded as a nullity, as no conviction at all, despite substantial evidence, then an arrest which is, in fact, no conviction at all, should so be regarded by the Courts. Else the law would enable all valid arrests to be considered in the

sentence calculus, despite some later unconstitutional trial eventuality which causes the conviction to be overturned. United States v. Tucker, 404 U.S., 443 (1971); Townsend v. Burke, 334 U.S. 737 (1947). In this case, the Court made the erroneous, improper and unconstitutional assumption that a dismissed charge was equivalent to a finding of guilt of that charge, a misconstruction of the legal significance of appellant's criminal record. United States v. Malcolm, 432 F. 2d 809 (2d Cir., 1978). This improper use of arrests on the vague list form of the rap sheet illustrates the danger of permitting official criminal records to contain such information. Courts certainly have a special obligation to disregard arrests on such lists when they do appear there.

> The existence of an arrest record whether amplified or not, and whether or not followed by a conviction, will subject the arrestee to a host of disabilities in his relation with the criminal justice system... Besides leading to the practical disabilities...failure to expunge an innocent person's arrest record violates constitutional protections, including the rights to privacy and due process. The courts have a special obligation, within their area of jurisdiction, to call a halt to the indiscriminate accumulation of information that threatens privacy and liberty.... A person who, having been arrested and then exonerated, is subjected to adverse treatment in the many ways referred to above as a result of the distribution of his arrest resord, while others, who are equally innocent of crime but did not have the misfortune to be arrested for an act they did not commit, does not receive... equality of treatment.... Among the most rudimentary concepts of our constitutional system is that there can be no punishment without proof of guilt... Yet to the extent that arrest records of innocent persons are used to draw adverse inferences as to their character, they constitute a continuing punishment in violation of the principle of due process of law.
>
> United States v. Hudson, 16 Cr.L. 2468, 2469-70 (D.C. Superior Court, 2-19-75); See also Morrow v. District of Columbia, 417 F. 2d 728, 741 (D.C. Cir., 1969)

It is true that this Court has permitted the consideration of evidence of uncharged criminal activity in the determination of sentence (United States v. Cifarrelli 401 F. 2d 512, 514 (2d Cir., 1968) cert. den. 393 U.S. 989; United States v. Doyle, 348 F. 2d 715, 721 (2d Cir., 1965 cert. den. 382 U.S. 843), but that is not what occurr in this case. Here, the Court considered no evidence of criminal activity, only the fact of a dismissed charge of criminal activity. The dismissal was certainly prima facie evidence that the charge had not been proved, and the Court did not have before it other and substantial evidence of the underlying facts of that charge. This Court's decisions in Doyle and Cifarrelli, supra, do not sustain the consideration of bare allegations unsupported by substantial evidence, especially when there is a prior judicial determination that those allegations had to be dismissed. Indeed, this Court has held that, "corroboration by defendant's admissions, undisputed facts or real evidence,"are necessary before uncharged criminal activity may be considered by the sentencing judge. United States v. Needles, 412 F. 2d 652, 658 (2d Cir., 1973); See also United States v. Weston, 448 F. 2d 626 (9th Cir., 1971) cert. den. 404 U.S. 1061. Certainly, if judicially dismissed charges are to be considered, and we argue they should not be, a much higher evidentiary burden falls on the sentencing judge who choses to rely on such dismissed charges. Here, of course, the judge had no evidence beyond the "rap" sheet itself.

> The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge... had become dismissed and the prisoner discharged by the magistrate.
>
> Townsend v. Burke, supra at 740.

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>
> Townsend v. Burke, supra at 740.

Thus, the Court's reliance on this improper factor in sentencing and its consequent disregard of the facts in mitigation requires reversal of the sentence and a remand for sentencing. An additional factor, however, stained the sentence determination in this case -- a probation report which took great pains to give a distorted, one-sided view of appellant. This Court is requested to obtain a copy of that report which was shown to counsel prior to sentencing. A reading of it will verify that its modus operandi was to document and emphasize negative factors in appellant's background, while denigrating and asserting the "unavailability" of documentation for the positive factors in his background. While negative factors were stated in the report as objective truths, positive factors were either reported as uninvestigated claims of appellant or left out entirely. Half truths were used to give the exact opposite impression of the truth, and unfounded subjective opinions of the reporter were given as conclusions about the actual operation of appellant's mind. The following are examples taken from the Report when it was shown to counsel on April 7 :

1. THE REPORT: Appellant had been unemployed since his arrest.

   THE TRUTH: Appellant was incarcerated after his arrest. While in prison he enrolled in the John Jay College of Criminal Justice and the Manpower Training and Development Program, and held down a regular prison job.

2. THE REPORT: Appellant claims he achieved his High School Equivalency Diploma at Clinton Prison, "although the records are not readily available".

   THE TRUTH: After failing to do the full investigative job necessary to establish the facts, the Report attempts to discredit what it then characterizes as only appellant's claim.

3. THE REPORT: Appellant was born out-of-wedlock, but disclaims fatherhood of any out-of-wedlock children of his own.

THE TRUTH: Since the reporter could find no evidence of out-of-wedlock children, appellant's disclaimer is presented to implant the impression that, as an out-of-wedlock child, appellant probably had a few out-of-wedlock children of his own, and that his disclaimer is obviously a falsehood.

4. THE REPORT: Appellant failed to profit from his previous incarcerations.

THE TRUTH: Appellant was an addict throughout those previous incarcerations, but during his last one at Clinton Prison he profited immensely by getting his High School Diploma and resolving to become heroin free and change his life, which he did.

5. THE REPORT: Appellant "appears shrewd and manipulative."

THE TRUTH: Beauty or the lack of it is in the eye of the beholder. To Mrs. Frances Rodriquez, Rehabilitation Counselor at Rikers and to Mr. John Purcell and Mr. Arthur Hawkins of the Harlem Unit of Beth Israel, appellant appears to be sincerely working to change his life. (See Appendix). The Report fails to say how or why or based on what actual facts appellant gave such an impression.

6. THE REPORT: Appellant's good intentions are "mere verbalizations"; he "has not recognized his own shortcomings and continues to display an anti-social mode of behavior"; he is "lacking meaningful goals for the future."

THE TRUTH: The facts belie the subjective contentions of an obviously insensitive and condescending probation reporter. It is a fact that appellant on his own began to change his life, achieved his High School Equivalency in Clinton, became voluntarily heroin free at the Harlem Unit, held down two jobs and studied carpentry, enrolled in John Jay and continued the study of carpentry in the Manpower Program, bought his own car and apartment and took on a third job as chauffeur when work fell off in the carpentry shop. Appellant had no "shortcomings" other than his own addiction, the causes for which are complex and are certainly related to his fatherless upbringing and the effect of which left him weak and

> insecure. He has recognized this and cured it and was on his wa toward the very meaningful goals of a straight life for the future.

This Report was thus a biased and inaccurate presentation. There was no attempt at neutrality, and all of the facts of appellant's demonstrated prospects for self-rehabilitation were minimized or ignored entirely. The critical function of the probation report, "to present the Court with.... all the factors which will influence the adjustment of an offender..." (Meeker, Analysis of a Presentence Report, 14 Fed. Prob. (March, 1950)) was not fulfilled by the Report in this case. Neutrality and a discussion of the "circumstances affecting his behavior," and "the reason for his antisocial conduct," the real cornerstone of the good presentence report, are missing here. United States v. Rosner, 485 F. 2d 1213, 1231 (2d Cir., 1973); F.R.Cr. P. 32(c)(2); Duffy, The Value of Presentence Investigation Reports to the Court, 5 Fed. Prob. 3 (July-September 1941). Instead of these, the Report is simply a compendium of negative facts and innuendos and conclusory language relegating appellant to some class of congenitally bad fellows. The job of pointing out to the Court the causal factors for appellant's prior "anti-social" behavior was left to counsel, and it is obvious what minimal credence was given to that source by the trial Court.

Because the Report was devoid of all touches of humanity, hopelessly partisan and sounding as if it had been written by government agents, and because it contained unfounded innuendos and unexplained conclusions (United States v. Phillips, 479 F. 2d 1200 (D.C. Cir., 1973); Goldfarb and Singer, After Conviction, 229 (1973)), it was a defective and prejudicial document which

prevented the Court from imposing sentence with "insight and understanding" based on correct and complete information, and deprived appellant of a fair sentence proceeding. United States v. Malcolm, supra at 819.

In remanding this case, we urge the Court to order that the proceeding be assigned to a different judge for purposes of resentencing. As was wisely noted in Mawson v. United States, 463 F. 2d 29, 31 (1st Cir., 1972):

> It is difficult for a judge, having once made up his mind, to resentence a defendant, and both for the judge's sake and the appearance of justice, we remand this case to be [resentenced by a different judge].
>
> (United States v. Schwartz, 500 F. 2d 1350 2d Cir., 1974)

See also United States v. Rosner, supra; United States v. Brown, 470 F. 2d 285 (2d Cir., 1972). Judge Bramwell has already indicated that he regards the facts brought to his attention by counsel to be mere "laudatory" remarks, and, upon any reconsideration, the thrust of the sentence argument would be the same. It does not stand to reason that the same judge would suddenly take these facts seriously and give them, and appellant, the consideration they deserve.

CONCLUSION

FOR THE ABOVE STATED REASONS, APPELLANT'S SENTENCE SHOULD BE VACATED AND THE CASE REMANDED TO A DIFFERENT JUDGE FOR RESENTENCING.

Respectfully submitted,

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